No. 82-1994

In the Supreme Court of the United States

OCTOBER TERM, 1983

KIRBY FOREST INDUSTRIES, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether in an action for condemnation pursuant to 40 U.S.C. 257 interest should be assessed for a period prior to the date the award is paid and the government obtains title to and possession of the land.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 696 F.2d 351. The opinion of the district court (Pet. App. B1-B11) is reported at 520 F. Supp. 75.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1983, and rehearing was denied on March 10, 1983 (Pet. App. Exh. C). The petition for a writ of certiorari was filed on June 7, 1983 and was granted on October 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE OF PROCEDURE INVOLVED

40 U.S.C. 257 provides:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

40 U.S.C. 258a provides in pertinent part:

> In any proceeding in any court of the United States * * * for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States.
>
> * * * * *
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> Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the

United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

Fed. R. Civ. P. 71A provides in pertinent part:

(a) Applicability of Other Rules. The Rules of Civil Procedure for the United States District Courts govern the procedure for the condemnation of real and personal property under the power of eminent domain, except as otherwise provided in this rule.

* * * * *

(i) Dismissal of Action.

(1) *As of Right.* If no hearing has begun to determine the compensation to be paid for a piece of property and the plaintiff has not acquired the title or a lesser interest in or taken possession, the plaintiff may dismiss the action as to that property, without an order of the court, by filing a notice of dismissal setting forth a brief description of the property as to which the action is dismissed.

(2) *By Stipulation.* Before the entry of any judgment vesting the plaintiff with title or a lesser interest in or possession of property, the action may be dismissed in whole or in part, without an order of the court, as to any property by filing a stipulation of dismissal by the plaintiff and the defendant affected thereby; and, if

the parties so stipulate, the court may vacate any judgment that has been entered.

(3) *By Order of the Court.* At any time before compensation for a piece of property has been determined and paid and after motion and hearing, the court may dismiss the action as to that property, except that it shall not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest so taken. The court at any time may drop a defendant unnecessarily or improperly joined.

STATEMENT

1. Although the Constitution contains no express grant of power to the federal government to take private property by eminent domain, the existence of that power is assumed in the Fifth Amendment, which conditions its exercise on the payment of "just compensation." Early decisions of this Court confirm the existence of the power as an inherent incident of sovereignty (see, *e.g.*, *Kohl* v. *United States*, 91 U.S. 367 (1875)).

The power may be exercised directly by legislative action, as for example in 16 U.S.C. 79c(b), which vests "all right, title, and interest in" certain land in Redwood National Park in the United States as of the date of enactment of the legislation, and establishes procedures for the determination of just compensation to the landowners divested. More typically, the legislation authorizing the project directs the appropriate agency to acquire lands within statutorily described areas. See, *e.g.*, 16 U.S.C. 698(c) (Big Thicket National Preserve); 16 U.S.C. 696 (National Key Deer Refuge); 16 U.S.C. 691 (Cheyenne Bottoms Migratory Bird Refuge).

The "straight condemnation" method by which public officials authorized to acquire private lands for public use may exercise the federal power of eminent domain, originally enacted in 1888, is now contained in 40 U.S.C. 257. That procedure is initiated by the filing of a complaint in condemnation, followed by a trial of the issue of just compensation, either to a jury or the court, or by a specially appointed commission (Fed. R. Civ. P. 71A(h)). Until the judicial proceedings fixing just compensation have been completed and the government has paid the judgment awarded, the landowner retains both possession of and title to the land in question, and the condemning authority has no power to control the owner's use of the property.[1]

In 1931, because of a perceived need to avoid the lengthy delays in initiating construction of federal buildings resulting from the straight condemnation procedures (H. R. Rep. 2086, 71st Cong., 3d Sess. (1930)), Congress provided an alternative procedure, currently contained in 40 U.S.C. 258a, that permits a federal official to file a "declaration of taking" in any condemnation proceeding at any time before judgment, and deposit the amount of the estimated just compensation.[2] Immediately upon the filing of the declaration of taking and the deposit, the title to the land vests in the United States; possession may thus be obtained at the time of the filing of the initial complaint, without waiting for the trial of the issue of

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[1] Although straight condemnation procedures originally were required to conform as nearly as possible to state practices (Act of Aug. 1, 1888, ch. 728, 25 Stat. 357), that provision was superseded in 1951 by Fed. R. Civ. P. 71A. See notes of Advisory Committee on Rule 71A, original report.

[2] The landowner is entitled to an expeditious distribution of the money so deposited (Fed. R. Civ. P. 71A(j)).

just compensation.[3] Under this procedure, if the judicially determined amount of just compensation is greater than the amount deposited, the government must pay the difference with interest from the date the declaration of taking is filed; no interest is due on the amount originally deposited.[4]

2. On October 11, 1974, Congress enacted Pub. L. No. 93-439, 88 Stat. 1254, establishing the Big Thicket National Preserve (hereinafter Preserve) (16 U.S.C. 698 *et seq.*), in order to save "displays of plant life found nowhere else in the United States * * * for continued scientific study and an educational and inspirational reminder to future generations" S. Rep. 93-875, 93d Cong., 2d Sess. 2 (1974).[5] The statute

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[3] In order to control appropriations, Congress has repeatedly directed the National Park Service to acquire lands by straight condemnation as a general practice, and not to file a declaration of taking without first notifying Congress. See S. Rep. 1527, 90th Cong., 2d Sess. 5 (1968); S. Rep. 93-875, 93d Cong., 2d Sess. 4 (1974).

[4] A fourth method by which the government may acquire lands, often termed "inverse condemnation," is by physical appropriation. As this Court explained in *United States* v. *Clarke*, 445 U.S. 253, 257 (1980), the subsequent landowner's suit is in truth an action to recover damages for a taking of his property without condemnation. The damages are measured by the value of the property at the time it was taken. See also *United States* v. *Dow*, 357 U.S. 17 (1958).

[5] Interest in preserving the Big Thicket National Preserve had led to studies of the area in 1965, 1966 and 1967. See S. Rep. 93-875, 93d Cong., 2d Sess. 2 (1974). The Texas Forestry Association and its members endorsed a 1967 National Park Service study that recommended a 35,500-acre Big Thicket Park, rather than the 84,550-acre preserve eventually established. As part of their endorsement for this smaller acquisition, the Association declared a moratorium on cutting of timber within the 35,500-acre area. See *Big Thicket National*

designated the "Beaumont unit * * * comprising approximately six thousand two hundred and eighteen acres" as part of the Preserve (16 U.S.C. 698(b)). That unit was described in the legislative history as "perhaps the wildest component * * * to be included in the Preserve" (S. Rep. 93-875, *supra*, at 4). It was also said that "at least the southern third of the unit is that extreme rarity—an area which has never been logged, unless a few bald cypress were removed many years ago. This inviolate condition is probably attributable to the difficulty of access across the many sloughs and fingers of swampland which penetrate the area" (*id.* at 16; attachment to letter from Department of Interior submitting bill and recommending its passage). In accordance with usual practice, the statute directed the Secretary of the Interior to acquire the lands necessary to establish the preserve (16 U.S.C. 698(c)).[6]

Park, Tex.: Hearing on H.R. 12034 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs, 92d Cong., 2d Sess. 52 (1972) (statement of Oliver R. Crawford, Vice President, Eastex, Inc.). Petitioner observed the voluntary moratorium beginning in 1967. *Id.* at 86, 88 (statement of J.B. Webster, Manager, Corporate Relations, Kirby Lumber Corp.), as did other timber companies in the area of the proposed preserve. See *Proposed Big Thicket National Reserve, Tex.: Hearings on H.R. 4270 Before the Subcomm. on National Parks and Recreation of the House Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess. 209, 212-213 (1973) (statement of James R. Shepley, President of Time, Inc.).

[6] Although the House bill had provided for a legislative taking, the Senate deleted this provision; as the Senate Report noted, legislative taking is an extraordinary measure to be used only when "the qualities which render an area suitable for national park status are imminently threatened with destruction" (S. Rep. 93-875, *supra*, at 5). Given the morato-

Petitioner, "an integrated forest products manufacturer, owning timberlands * * * to supply the raw material for its manufacturing facilities" (Pet. Br. 3 n.3), owned almost a third of the land contained in the Beaumont unit of the Preserve (Pet. App. A2; Pet. Br. 3). After negotiations for purchase proved unsuccessful, the United States filed a complaint in condemnation on August 21, 1978 with a view to acquiring petitioner's 2,175.86 acres within the boundaries of the Preserve (J.A. 5-6). The action was referred to a commission for the ascertainment of the amount of just compensation due petitioner (J.A. 1).

On March 6, 1979, the opening day of the trial before the commission, the parties stipulated that "today is the date of taking" (J.A. 17). The witnesses, the parties and the commission evidently understood that the fair market value of the property was to be determined as of that date (III Tr. 604; V Tr. 154; see Memorandum for the United States at 3). At trial, petitioner's Senior Vice President testified that petitioner had no present intention of logging in the area, which had been considered by the company to be a "reserve logging area" at least since the early 1950's (I Tr. 52).

On March 3, 1980, the commission entered its report recommending an award of just compensation of $2,331,202 (Pet. App. B1). Both the United States and the petitioner promptly filed objections in the dis-

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rium, the availability of the declaration of taking procedure "should any particular area within this Preserve be threatened" (*ibid.*), and the traditional prompt congressional response to notice of the intent to file such a declaration (see note 3, *supra*), the Senate concluded that it was preferable to avoid a legislative taking that "would require the United States to pay interest computed from the time of taking until the date of final payment" (S. Rep. 93-875, *supra*, at 6). The statute was enacted without the legislative taking provision.

trict court to the commission's report (Pet. App. A2). A hearing on both parties' objections was held in January 1981, and on August 13, 1981, the district court entered judgment (J.A. 21-23) awarding petitioner just compensation in the amount recommended by the Commission plus interest at the rate of six percent from August 21, 1978—the date the complaint in condemnation was filed—on the theory that the property was taken on that date, because institution of the condemnation proceedings "effectively denied [petitioner] economically viable use and enjoyment of its property" (Pet. App. B10). The United States deposited the amount of the judgment, including interest as assessed, in the registry of the court on March 26, 1982 (J.A. 27).

4. Both parties appealed (Pet. App. A2).[7] The court of appeals reversed the district court's award of interest, Judge Jolly dissenting.[8] Relying on this Court's decisions in *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) and *Danforth* v. *United States*, 308 U.S. 271 (1939), the court of appeals held that "the mere commencement of straight condemnation proceedings, where the government does not enter into possession during those proceedings, does not constitute a tak-

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[7] The instant case was consolidated on appeal with another case involving condemnation of another tract for the Big Thicket National Preserve that also raised the question of the payment of interest in straight condemnation cases. The second case, *United States* v. *13.32 Acres of Land*, C.A. No. 81-2471, is not before this Court.

[8] Responding to objections by both parties, the court of appeals unanimously remanded the case to the district court for further proceedings because of the inadequacy, under this Court's decision in *United States* v. *Mers*, 376 U.S. 192 (1964), of the report of the commission (Pet. App. A12).

ing" (Pet. App. A6). Because the government here had not entered into possession or substantially interfered with the use of the petitioner's property, the court determined that the date of taking was the date of the payment of the award when title passed to the government (Pet. App. A11). Noting that the stipulation concerning the "date of taking" at the opening of trial "did not deprive the owners of the enjoyment of their lands, nor did it give the government any interest in those lands" (Pet. App. A9), the court of appeals (like the district court) read the stipulation as simply an agreement as to the date of valuation.

The majority of the court refused to follow the decision of the Ninth Circuit in *United States* v. *156.81 Acres of Land*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982),[9] which held that, when the condemned property is unimproved, interest in straight condemnation cases is due from the date the judgment is entered until the award is paid and the title taken.[10] Rejecting the rationale of that decision, the court noted that "[w]hether or not the property is improved, the judgment in condemnation does not deprive the landowner of a present use. The rented property continues to provide rent; the wilderness property continues to provide recreational uses" (Pet. App. A10).[11]

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[9] See also *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert. denied, No. 82-1333 (Mar. 21, 1983)).

[10] Judge Jolly found that decision persuasive (Pet. App. A14-A15).

[11] The court also rejected petitioner's argument that the award of interest would compensate it for a possible increase in the value of the property between the date of valuation and

SUMMARY OF ARGUMENT

The owner of property that is taken by eminent domain is entitled to just compensation, which is the fair market value of the property at the date of taking contemporaneously paid in money. When the taking precedes full payment, interest on the unpaid amount is due from the date of taking to the date of payment to compensate for the delay. Interest simply makes up for the loss during the period of the delay, of the use of the money awarded. It is not intended to reflect any increase in the value of the property that may have occurred either before or after the date of taking, because the respective rights of the government and the landowner became fixed at that date.

Attempts to correct perceived injustices to landowners arising out of the condemnation process through adjusting the dates when property will be assumed to have been taken are inconsistent not only with established principles of eminent domain, but also with congressional intent, as reflected 1) in the existence of a statutory alternative to straight condemnation that specifically permits the government to accomplish a peremptory taking of private property, 2) in congressional directives to the Park Service to use the special taking authority only in emergency situations, and 3) in Fed. R. Civ. P. 71A, which permits the dismissal of a condemnation action before the property is taken by the payment of the award. This Court's decisions have also recognized that in a straight condemnation suit, the taking oc-

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the payment of the award, finding "no reason to award interest on the basis of speculation" (Pet. App. A9); here, where "[t]he dates of judgment and payment * * * were relatively contemporaneous," the court found no evidence that "the earlier valuation date [was] unjust" (Pet. App. A10).

curs when the award is paid, and fluctuations in value in the course of the proceedings before that time do not constitute takings in the constitutional sense.

Of course, a taking may occur before the payment of the condemnation award if the government exercises dominion and control over the property, either by entering into possession or by appropriating some substantial interest in the property to its own use. No such appropriation occurs in the typical straight condemnation suit, of which this case is a good example. Neither the legislative decision to acquire the land, the filing of the condemnation suit, nor the entry of the judgment on the condemnation award is such an exercise of governmental control over the property (whether or not the property is improved or producing current income) that it constitutes a taking under this Court's decisions.

The rule is not unfair to the owners of land subject to condemnation. The desirability of any particular date of taking to any particular landowner will depend on the vagaries of the market value of that type of land. If it is assumed that land prices in general rise over time, the interest of landowners normally will be served by having the valuation date—and thus the taking date—delayed as long as possible. Because of the difficulties of predicting land values at an unknown future date, the valuation date in the typical straight condemnation case is the date of trial, rather than the date when the property is subsequently taken. But if there is a substantial delay between the valuation date and the taking date, and if the value of the property increases during that delay so that the condemnation award no longer represents just compensation on the date of taking, the landowner's remedy is to obtain a determination of the current market value of the land, not to seek the

award of interest from some hypothetical date of taking.

Alternatively, if governmental actions outside the scope of the proceeding and before the property is taken adversely affect the possession and use of the property, the landowner's remedy is a suit for injunction against those extrajudicial activities or perhaps for recovery for inverse condemnation.

ARGUMENT

I. THE AWARD OF INTEREST FOR ANY PERIOD BEFORE TITLE OR POSSESSION PASSES TO THE GOVERNMENT WOULD BE CONTRARY TO THE INTENT OF CONGRESS AND ESTABLISHED JUDICIAL PRECEDENT

The decision below correctly applies established principles governing the determination of just compensation in straight condemnation cases; it is entirely consistent with congressional intent, as reflected in the various statutes and congressional directives relating to condemnation, and with the rulings of this Court.

The landowner is entitled to the fair market value of the land paid contemporaneously with the taking, and interest on any amount not so paid from the date of taking to the date of payment. Petitioner does not dispute this fundamental principle of the law of eminent domain (Pet. Br. 10). Nevertheless, although he pitches his argument on a discussion of when a "taking" occurs, his underlying thesis—that it is somehow unfair to deny interest in the typical straight condemnation case, where the government acquires neither title nor possession before it pays the compensation award—turns on a confusion between the concepts of fair market value and interest. The two concepts are in fact quite distinct, although both are elements of just compensation.

The compensation to which a landowner is constitutionally entitled is that which is the equivalent of the property "paid contemporaneously with the taking" *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 306 (1923); accord, *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947); *Shoshone Tribe* v. *United States*, 299 U.S. 476, 497 (1937); cf. *Smyth* v. *United States*, 302 U.S. 329, 353 (1937). Thus, when the taking in fact occurs before the payment—for example where there is a declaration of taking under 40 U.S.C. 258a, or the government enters into possession before payment of the full amount finally awarded—an award of interest is necessary in recognition of the delay in payment.[12] Interest, which is a form of consideration for the use of money, simply recompenses the landowner for the loss of use of the award in the interim between the taking and the payment of the sum due, and the longer the delay, the greater the interest due.[13] In

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[12] Accordingly, no interest is due on amounts deposited with the court at the time of a taking pursuant to 40 U.S.C. 258a, which become immediately available to the landowner (Fed. R. Civ. P. 71A(j)). Interest is due only on that portion of just compensation, if any, later found due and owing.

[13] Because of the role of interest in determining just compensation, the United States has acquiesced in decisions of several courts of appeals that the six percent interest rate in 40 U.S.C. 258a is not a ceiling on the amount of interest that may be awarded in a condemnation suit. See *United States* v. *329.73 Acres of Land*, 704 F.2d 800, 812 & n.18 (5th Cir. 1983) (en banc) (citing cases). Thus if, contrary to our submission, interest were appropriate in this case, we would agree with petitioner (Pet. Br. 49) that a formula for interest could properly be determined on remand without regard to the statutory limitation.

contrast, the fair market value of the land may rise or drop over time, so that the desirability to the landowner of an earlier, rather than a later, date for the calculation of the fair market value will depend on the vagaries of the market place.

The date of valuation in the typical straight condemnation case should in strict logic be the date at which the government pays the award and acquires title and possession. But, as a practical matter, "it verges on the impossible to require the condemnation commissioners to ascertain the value of land as of an entirely unknown future date, which may be a few months in the future and which may be a few years in the future" *United States* v. *Crary*, 2 F. Supp. 870, 878 (W. D. Va. 1932). Accordingly, the usual valuation date is, as it was here, the date of the trial. This has the practical advantage of permitting the commission to determine current values, rather than requiring them to make adjustments for past or future valuations (2 F. Supp. at 879) while also providing the closest feasible date to the date of actual taking.[14] If the value of the land in fact rises significantly during any delay between the trial and the date the actual taking occurs, the landowner is entitled to a

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[14] Of course, if there is either a declaration of taking or an entry into possession before the trial, that date establishes the date of taking and the date of valuation. Although petitioner suggests that the cases present "a picture of confusion" (Pet. Br. 40-41) as to the date of taking, the cases he cites largely deal with situations in which there was an entry into possession or, as in *United States* v. *Powelson*, 118 F.2d 79 (4th Cir. 1941), rev'd on other grounds, 319 U.S. 266 (1943), a declaration of taking (see 319 U.S. at 268). The other cases on which he relies followed state procedures regarding the date of taking pursuant to Act of Aug. 1, 1888, ch. 728, 25 Stat. 357, before the enactment of Fed. R. Civ. P. 71A. See note 1, *supra*.

recomputation of fair market value.[15] The landowner is not made whole by an award of interest.

A. The legislative scheme provides for alternative dates of taking of condemned land

In refusing to find a taking until the judgment was paid, the court below conformed to the evident congressional intent, as reflected not only in the distinction between 40 U.S.C. 257 and 40 U.S.C. 258a, but also in Fed. R. Civ. P. 71A and in its repeated directions to the Park Service to avoid taking in advance of judgment, except when necessary to preserve the character of the property taken by the filing of a declaration of taking.

The declaration of taking authority in 40 U.S.C. 258a was granted in 1931 to provide a more expeditious procedure for the construction of federal buildings on condemned land, in large part in order to stimulate employment during the Depression (H.R. Rep. 2086, 71st Cong., 3d Sess. (1930); 74 Cong. Rec. 777 (1930) (remarks of Reps. Graham and Stafford); *id.* at 779 (remarks of Rep. LaGuardia)). Although there had been some questions concerning the constitutionality of a procedure in which the taking precedes the payment, those questions were laid to rest in *Sweet* v. *Rechel*, 159 U.S. 380 (1895); thus the House Report on the Declaration of Taking Act asserted that the constitutionality of the proposed procedure was established (H. R. Rep. 2086, 71st Cong., 3d Sess. 1 (1930)).[16]

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[15] The government is similarly entitled to a recomputation if the value of the land drops in the interim.

[16] Petitioner's suggestion (Pet. Br. 43-44) that the traditional straight condemnation method poses constitutional problems precisely because payment and taking are simultaneous is flatly inconsistent with this history. Indeed, 40 U.S.C. 257 is a statutory enactment of a type of eminent domain proceed-

The new procedure was not intended to replace the traditional straight condemnation procedures. See 40 U.S.C. 258d (power to take by declaration not to abrogate, limit or modify any other condemnation power granted by federal or state law).[17] The authority granted by Section 258a is today reserved for the situation in which a prompt taking is necessary in order to preserve the interests to be served by the condemnation. For example, in establishing the Big Thicket National Preserve, Congress directed the Secretary of the Interior to "file a declaration of taking in the usual manner * * * should any particular area within this Preserve be threatened" (S. Rep. 93-875, *supra*, at 5-6).[18] Congress thus recognized for this

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ing that was used by the states from the beginning. See, *e.g., Garrison* v. *City of New York*, 88 U.S. 196, 204 (1874) (state constitution prohibits a taking before payment, except in emergencies); *Cherokee Nation* v. *Southern Kansas Ry.*, 135 U.S. 641, 659 (1890) (noting that although several state constitutions require that payment precede taking, Fifth Amendment does not). It thus is frivolous to assert that 40 U.S.C. 258a, enacted in 1931 to meet special federal concerns, provides the only procedure that accords constitutionally adequate protections to the landowner.

[17] Indeed, the Declaration of Taking Act does not bestow independent authority to condemn lands for public use. On the contrary, it provides a proceeding ancillary or incidental to suits brought under other statutes. *United States* v. *Dow*, 357 U.S. 17 (1958). Resort to the declaration of taking procedure is strictly optional with the Government. *United States* v. *Catlin*, 142 F.2d 781 (7th Cir. 1944).

[18] In establishing other wilderness areas, Congress has similarly directed the Secretary to file declarations of taking only after notifying Congress of the emergency conditions justifying such actions. See, *e.g.*, S. Rep. 1597, 90th Cong., 2d Sess. 5 (1968). Congress is sensitive to the extra expense involved

project that straight condemnation is the expected procedure, and a declaration of taking the exceptional one. The district court (Pet. App. B10-B11) and petitioner (Pet. Br. 47) essentially reject that proposition. Instead, petitioner asks this Court to rule that in straight condemnation, as in a declaration of taking under 40 U.S.C. 258a, the taking occurs when the complaint is filed (Pet. Br. 45).[19]

Because there is no taking in a straight condemnation action until the judgment is paid, Fed. R. Civ. P. 71A(i)(3) permits the dismissal of the action by order of court at any time before "compensation * * * has been determined and paid," so long as the condemnor has not taken possession or "title or a lesser interest."[20] This provision is consistent with this

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when interest must be paid from the date of immediate taking (S. Rep. 93-875, *supra*, at 6).

[19] Although petitioner asserts (Pet. Br. 47) that his proposal retains some difference between the procedures under 40 U.S.C. 257 and 258a, that difference is only that, he alleges, no deposit of funds would be required at the time of taking under Section 257. He thus apparently contemplates that under Section 257 the date of taking would be a hypothetical date, at which neither possession nor compensation passed. That is flatly inconsistent with the basic concept of a taking, which means precisely the date at which the rights to possession and payment accrue. In any event, petitioner's proposal overlooks the clear statutory distinctions in the procedures under the two statutes.

[20] The reference to "title or a lesser interest" evidently reflects the possibility that the interest being acquired may be less than full title. It also provides for the situation in which the condemnor's actions may have affected the landowner's right to use or possession of the property to such an extent that the condemnor has in fact taken a partial interest in the property. In that case, an award of just compensation measured by the value of the interest taken, might be appropriate on an inverse condemnation theory. See pp. 35-36, *infra*.

Court's explanation of the effect of the award in a straight condemnation action in *Danforth* v. *United States*, 308 U.S. 271, 284 (1939) (footnote omitted):

> The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. Condemnation is a means by which the sovereign may find out what any piece of property will cost.

Cf. *United States ex rel. TVA* v. *Welch*, 327 U.S. 546, 554 (1946); *Brown* v. *United States*, 263 U.S. 78 (1923). Rule 71A accordingly permits the sovereign to withdraw after determining the cost of the property, precisely because there has as yet been no taking.[21]

While it has been careful to protect the government's interests by providing alternative methods of condemnation, Congress has not ignored the burdens that the exercise of the power of eminent domain imposes on landowners and others affected by the taking. In the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, it has carefully delineated the procedures to be followed in order "to assure consistent treatment of owners * * * and to promote public confidence in Federal land acquisition practices" (42 U.S.C. 4651). For example, federal agencies are directed to "make every reasonable effort" to acquire

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[21] In addition, Rule 71A (i) (1) permits the sovereign to dismiss the action as of right before the hearing to determine compensation if it has not entered into possession, or acquired title or lesser interest. This provision is also inconsistent with the theory that the property is taken at any point before the hearing.

property by negotiation rather than condemnation (42 U.S.C. 4651(1)); to pay the agreed purchase price, deposit the appraised fair market value with the court pursuant to 40 U.S.C. 258a, or pay the full amount of the condemnation award before requiring the owner to surrender possession (42 U.S.C. 4651 (4)); and to institute formal condemnation proceedings in order to exercise the power of eminent domain, rather than relying on inverse condemnation (42 U.S.C. 4651(8)). Moreover, Congress has directed the court having jurisdiction over a condemnation proceeding that is either dismissed or abandoned to award the landowner a sum sufficient to reimburse him for "his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings" (42 U.S.C. 4654(a)). As this Court has emphasized, however, "such compensation is a matter of legislative grace rather than constitutional command" *United States* v. *Bodcaw Co.*, 440 U.S. 202, 204 (1979). Congress has not provided for the payment of interest before taking.

B. This Court's decisions confirm that the taking occurs when the straight condemnation award is paid

If the policies underlying the power of eminent domain and the legislative enactments relevant thereto left any doubt that the taking in the normal straight condemnation case occurs when the judgment is paid on the award, that doubt would be laid to rest by *Danforth* v. *United States*, 308 U.S. 271 (1939). In *Danforth* this Court concluded (308 U.S. at 284) (footnote omitted) that "[u]nless a taking has occurred previously in actuality or by a statutory provision, which fixes the time of taking by an event such as the filing of an action, we are of the view that the

taking in a condemnation suit * * * takes place upon the payment of the money award by the condemnor. No interest is due upon the award." In applying this principle in *Danforth*, the Court rejected the argument that the government "in actuality" took a flowage easement in the land involved either when Congress passed the Flood Control Act that authorized the condemnation or when the government built levees as part of the project, even though these actions had, as a practical matter, reduced the landowner's ability to use or sell his land. The Court instead held that the reduction in the value of the land, like other changes in value that are incidents of ownership, "cannot be considered as a 'taking' in the constitutional sense" (308 U.S. at 285). This Court has recently reiterated the teaching of *Danforth* in *Agins* v. *City of Tiburon*, 447 U.S. at 263 n.9. ("Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, * * * cannot be considered as a 'taking' in the constitutional sense".) Cf. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978); *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (no taking where statute forbids sale of property).

Petitioner's attempts to distinguish *Danforth* are unavailing. *Danforth* has not been—and should not be—limited to its special facts (see *Agins* v. *City of Tiburon*, 447 U.S. at 263 n.9; *United States* v. *156.81 Acres of Land*, 671 F.2d at 338; *United States* v. *Dow*, 357 U.S. 17, 27 (1958)).[22] There is no merit

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[22] Petitioner argued unsuccessfully below (Pet. App. A8) that *Danforth* applies only to takings under the Flood Control Act, and suggests here (Pet. Br. 18) that the statute involved there "differ[s] markedly" from the instant one. This is incorrect. The easement in *Danforth* was obtained in furtherance of a general plan to control flooding in the Mississippi Valley and was specifically authorized by the Flood Control

to petitioner's apparent suggestion (Pet. Br. 22) that where the purpose of the condemnation is to preserve the area as a wilderness, the property is "appropriated to public use" simply because it is preserved in its original condition. Under that theory, there is *no* point at which the taking could be said to occur, as the preservation continued throughout petitioner's ownership of the land, and back through recorded time. The only possible point of taking under that analysis would be the date of enactment of the legislation establishing the Preserve, and *Danforth* clearly precludes the use of that date: "The mere enactment of legislation which authorizes condemnation of property cannot be a taking. Such legislation may be repealed or modified, or appropria-

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Act of 1928, ch. 569, §§ 1-14, 45 Stat. 534-539, 33 U.S.C. 702a-702m. That statute provided that the Secretary of War was to "cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which * * * are needed in carrying out this project" (§ 4, 45 Stat. 536, 33 U.S.C. 702d). No date for acquisition of the properties needed for the project was specified, and the Act made applicable the "provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918" to the acquisition process itself (§ 4, 45 Stat. 536). Section 5 of the River and Harbor Act, 40 Stat. 911 (like the current 40 U.S.C. 258a), allowed the United States, upon the filing of a petition and "deposit of moneys or other form of security" to take immediate possession of property condemned. However, the United States did not proceed, in *Danforth*, to condemn the property in this fashion; rather, the United States took Danforth's property by straight condemnation, "upon the payment of the money award" 308 U.S. at 284. The procedure used by the government in *Danforth* is exactly the process by which property is taken under 40 U.S.C. 257; clearly, *Danforth* established a rule applicable to straight condemnation proceedings generally.

tions may fail" (308 U.S. at 286) (footnote citing cases omitted).[23]

II. NO TAKING OCCURS BEFORE TITLE PASSES IN A TYPICAL STRAIGHT CONDEMNATION SUIT

Because of a perceived unfairness to the landowner resulting from delays either from the enactment of the legislation establishing the federal preserve or from the entry of judgment in the condemnation suit to the date the judgment is paid and possession and title pass to the sovereign, the district court, the dissent below, and petitioner propose a variety of alternative points at which they contend the "taking" occurs and the right to interest accrues.[24]

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[23] Petitioner also disputes (Pet. Br. 22) the court of appeals' conclusion (Pet. App. A8) that Danforth, whose lands were actually flooded, suffered more injury, and thus more nearly a taking, than petitioner. As petitioner notes, the Court pointed out that Danforth's land would have been flooded by the unusual high water of 1937, whether or not the set back levee had been constructed, but the Court also referred to "the retention of water from unusual floods for a somewhat longer period or its increase in depth or destructiveness by reason of the set-back levee" as "incidental consequences" of the construction of the levee that did not amount to a taking (308 U.S. at 286-287). There are no such "incidental consequences" to petitioner here, who voluntarily agreed to a timbering moratorium proposed by the local forestry association (see note 5, *supra*), and whose purpose with regard to the land condemned for the Beaumont unit, since long before enactment of the Big Thicket National Preserve legislation was simply to hold the land as a "reserve." There is absolutely no indication that, absent any governmental action at all, petitioner would have decided that it wished to cut the largely inaccessible timber in the reserve. See pp. 7-8, *supra*.

[24] It is far from clear that those proposing the alternative "taking" dates recognize that those dates would then also

Although the House bill establishing the Big Thicket National Preserve proposed that the Preserve be established by a legislative taking of the land, the Senate rejected that approach (S. Rep. 93-875, *supra*, at 5), and petitioner evidently does not contend that there was such a taking here (Pet. Br. 16-17). There has never been a declaration of taking as authorized by 40 U.S.C. 258a, nor did the government ever take possession of the property before it paid the judgment and acquired title on March 26, 1982. Petitioner does not dispute these assertions, which are in any event clear from the record.[25] It is also clear that the traditional straight condemnation procedure contemplated by 40 U.S.C. 257 is in essence a forced sale by the landowner to the government, at which the purchase

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establish the date at which the fair market value must be determined. The question does not arise in this case, because of the stipulation as to the valuation date. However, to the extent that the perceived unfairness is based on the assumption that the market value of land necessarily increases over time (but see pp. 34-35, *infra*), the earlier taking dates would be disadvantageous to the landowner, because they would require that his property be valued at that earlier time. Any other rule would require the government not only to pay the higher valuation, but also interest on that higher valuation back to the date of taking, when the property was worth less. Such double recovery is hardly compensation that is "just" to the public. See *United States* v. *Commodities Corp.*, 339 U.S. 121, 123 (1950).

[25] In an affidavit attached to the government's memorandum in opposition to the petition for rehearing, the project manager responsible for acquisition of land in the Big Thicket National Preserve explained the care taken by federal personnel to obtain petitioner's consent before entering its land for any purpose before March 26, 1982 (Jewell Affidavit at 2-4). We are lodging a copy of this Affidavit with the Clerk of this Court.

price is judicially determined, and then the purchase is made by the exchange of the established price for the title to the property (see, *e.g.*, *Danforth* v. *United States*, *supra*). Accordingly, any "taking" that occurred here before title passed could only have been an actual seizure by the government of petitioner's property, for which he is entitled to an award measured by the value of the interest taken—*i.e.*, an "inverse condemnation" (see *United States* v. *Clarke*, 445 U.S. at 257-258).[26]

No such taking occurred here, nor is it appropriate to establish a general rule for straight condemnation cases of the sort proposed by petitioner or by the dissent below, which will impute such takings to the government.[27] Rather, the collateral consequences of the pendency of the condemnation action are simply incidental effects of the government's exercise of the power of eminent domain. Such incidental effects are not Fifth Amendment "takings." *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923); *United States* v. *Grand River*

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[26] Because the district court has jurisdiction to award damages against the United States only on claims not exceeding $10,000 (28 U.S.C. (& Supp. V) 1346), all other inverse condemnation actions would have to be brought in the Claims Court (28 U.S.C. (Supp. V) 1491). To the extent that the district court's award of relief to petitioner is based on an inverse condemnation theory (Pet. App. B8), it exceeded its jurisdiction.

[27] Any such general rule would be flatly inconsistent with congressional directives in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which specifically directs federal agencies *not* to take by inverse condemnation (42 U.S.C. 4651(8)), and enforces this direction by requiring that the property owner's costs, including attorneys' fees, shall be paid when compensation is awarded on an inverse taking theory.

Dam Authority, 363 U.S. 229, 236 (1960). Cf. *United States* v. *Bodcaw Co.*, 440 U.S. at 203. ("One principle from which [this Court] has not deviated is that just compensation 'is for the property, and not to the owner,' " quoting *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 326 (1893).)

A. There is no constitutional taking on the date the complaint in condemnation is filed

Petitioner's primary claim is apparently that the date of the filing of the complaint in condemnation should be the date of taking (Pet. Br. 45).[28] But that

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[28] Petitioner also relies on the stipulation entered at the valuation hearing (p. 8, *supra*) as establishing the date of taking (Pet. Br. 6-7, 31-32). This claim was correctly rejected by both courts below (Pet. App. B3, A8-A9). As the court of appeals concluded (Pet. App. A9), "[t]he stipulation did no more than establish a date from which the value of the property could be determined"; that was all the commission was concerned with, and all the parties were interested in addressing at that time. In referring to the "date of taking" rather than the "date of valuation," the Chairman of the Commission was simply reflecting the general recognition of the identity of the two dates, because of the principle that valuation must be established as of the date of taking—since no taking had yet occurred, or would occur at any specific date that could then be ascertained, it was necessary to stipulate to the date of valuation. That there was no intent to establish a date of taking is reflected by the parties' continued recognition of petitioner's right to retain exclusive possession of the property until March 26, 1982, when the judgment was paid (see note 25, *supra*). In any event, the stipulation did not constitute a binding determination of the date the government received actual or constructive possession of the property. *United States* v. *Mahowald*, 209 F.2d 751, 754 (8th Cir. 1954); cf. *Swift & Co.* v. *Hocking Valley Ry.*, 243 U.S. 281, 289 (1917) (stipulation as to legal effect of admitted facts does not bind court); *Estate of Sanford* v. *Comm'r*, 308 U.S. 39, 51 (1939) (same).

filing did not of itself permit the government to exercise any control over the property. As the notice of lis pendens explains (J.A. 7), the institution of the suit merely showed that the government "seeks to acquire [the described property] by condemnation." In order to obtain possession or control over the property, the government would have had to file a declaration of taking, as permitted in 40 U.S.C. 258a, as well as the complaint in condemnation. This it did not do. Absent such a formal taking, the landowner in possession retains the full power to treat his property as he sees fit (see S. Rep. 93-875, *supra*, at 5-6). The institution of legal proceedings is not sufficient by itself to achieve the result sought as the ultimate outcome of those very proceedings. Acceptance of petitioner's views would leave the government with no means of determining, in advance of taking, whether the cost of the property outweighed its utility for the intended purposes (see *Danforth* v. *United States*, *supra*). It would preclude the government from moving for dismissal under Fed. R. Civ. P. 71A.

B. There is no taking on the date of the condemnation judgment

The dissent below (Pet. App. A13-A14) and the Ninth Circuit (*United States* v. *156.81 Acres of Land*, 671 F.2d 336 (1982), cert. denied, No. 82-552 (Dec. 13, 1982)),[29] concluded that for "unimproved property" (Pet. App. A14) or property that is not "income-producing" (671 F.2d at 340), the date of taking is the date of the judgment in the condemnation proceeding, on the theory that the judgment "effectively takes the condemnee's land by denying any economi-

[29] See also *United States* v. *15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert. denied, No. 82-1333 (Mar. 21, 1983) (interest due from stipulated date of valuation, more than a year before trial).

cally viable use" (*id.* at 339). This distinction between vacant or unimproved land and income-producing land does not withstand analysis. It assumes that unimproved land is necessarily held for speculative purposes, while improved land is not. But improved land may well be held with the intention of upgrading its use, and unimproved land may be held without any intention of deriving any present economic benefit from it. There is no reason why only the speculative interests of unimproved landowners merit protection.

Indeed, to the extent that interest is designed to compensate the landowner for the loss of the use of the property between the date of the taking and the payment of the award, the owner of non-productive land—who had no current income from the land before the taking, and thus lost nothing that he previously enjoyed—has a less worthy claim to interest than a particular owner of income producing property who can show that his ability to continue to gain a return on his land has been diminished by the pendency of the proceeding. Cf. *United States* v. *Holden*, 268 F. 223, 224 (N.D.N.Y. 1920).

Thus, this analysis oversimplifies the almost limitless varieties of benefits landowners may derive from their property, even if only economic benefits are considered. It is simply not true that an impending condemnation necessarily has a greater economic impact on the owner of unimproved or non-income-producing land than it does on the owner of improved property. Improved property may become difficult, or even impossible, to rent or to use at a profit once the condemnation judgment is entered. And, as the facts of this case cogently demonstrate, the landowner may derive a substantial economic benefit from holding unimproved land, even when it is not currently in-

come producing. Petitioner had held the tract involved here as a reserve logging area at least since the early 1950's—well before any congressional interest in acquiring land in the Big Thicket National Preserve developed (I Tr. 52). There is absolutely no indication in the record that petitioner had any plans to convert the area from a reserve to an active timber producing area that were frustrated by the pendency of the condemnation proceedings, let alone by the entry of judgment. Indeed, the inaccessibility of the area (S. Rep. 93-875, *supra*, at 4, 16) and petitioner's willingness to enter into a lengthy voluntary moratorium on logging in the area strongly suggest that it had no such plans, and was perfectly content to retain the area as a reserve until it received the payment of just compensation, which would enable it to substitute other property to serve the same function—a reserve in case of future need for additional sources of timber.

A general provision that the date of judgment is the date of taking for all property, whether income producing or not, would avoid the difficulties of attempting to distinguish among the numerous varieties of economic interests in land. But such a result would permit the exception to swallow the rule. As the dissent below and the Ninth Circuit recognized (Pet. App. A14; 671 F.2d at 339-340), the economic reality of the usual situation, involving income producing property, is that the owner of such property continues in possession with his enjoyment of all the benefits of that possession unaffected by the entry of judgment. The special rule for unimproved property addresses the perceived unusual needs of the owners of such property. Those unusual needs, even if they do exist (but see pp. 34-35, *infra*), do not justify a rule that would provide a windfall to the owners of income producing property. Such owners should not be

permitted both to retain the benefits of their possession of the property and also to receive additional compensation based on the assumption that they have been deprived of those benefits.

C. There was no taking on the particular facts of this case

The district court here (Pet. App. B8-B10) appears to have invoked the case-by-case approach that this Court has applied in cases involving land use planning by local jurisdictions. See, *e.g.*, *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). Under those decisions, the determination whether a given restriction on the use of property is invalid in the absence of just compensation "depends largely 'upon the particular circumstances [in that] case'" (*Penn Central Transportation Co.*, 438 U.S. at 124, quoting *United States* v. *Central Eureka Mining Co.*, 357 U.S. at 168). While such "essentially ad hoc, factual inquiries" are entirely appropriate in that context, there are serious practical difficulties with a similar method for determining the date of taking in a condemnation proceeding. As we have shown, and as petitioner concedes (Pet. Br. 10), the date of taking establishes the date of valuation, upon which the expert testimony concerning the fair market value of the property is based. That date must accordingly be clearly established at the time of trial, or the testimony is useless. If the date of taking turns on an ad hoc evaluation of the facts of the particular case, the commission must either predict the result that the appellate court will reach, or make alternate findings of fair market value for a number of possible dates of taking. The former approach runs a high risk of reversal, with the need to repeat

the entire process, if the prediction is inaccurate; the latter approach would render the condemnation trial unmanageable, as the experts attempted to testify as to alternative valuations based on various uses at various times.[30]

In any event, applying the factors summarized in *Penn Central Transportation Co.*, 438 U.S. at 124-128, there has been no "taking" here. As we have seen (p. 29, *supra*), there was here no interference with petitioner's "distinct investment-backed expectations" (438 U.S. at 124) with regard to its reserve logging area at any time before title was taken and the judgment paid, nor was there any "physical invasion by government" (*ibid.*) before that time.[31] Even assuming that there was some diminution in economic value before title and possession passed, the Court emphasized in *Penn Central Transportation Co.* that such adverse effects alone do not establish a taking (438 U.S. at 124-127). Indeed, regulations have been held not to be takings even where the impact on the owners is extremely severe. See *Andrus* v. *Allard*, 444 U.S. at 67-68 (statutory prohibition on sale of property); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (destruction of cedar trees to prevent spread of disease to area's commercially valuable apple trees); *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law);

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[30] It is no answer to suggest that the problem could be solved by stipulation as to the date of valuation. Since each party would be free to select among a number of possible dates the one that would provide the most favorable valuation for it, there would be small incentive for either to agree to stipulate.

[31] Since the trees continued to grow on the land, the delays actually increased the timbering potential of the land.

Hadacheck v. *Sebastian*, 239 U.S. 394 (1915) (87% diminution in value). Cf. *Danforth*, 308 U.S. at 284.

The event upon which petitioner principally relies (Pet. Br. 6, 31) to establish its claim that the government "took" its property before title passed is the establishment of a moratorium on logging in the area.[32] But petitioner has conceded that it voluntarily instituted the moratorium on its own initiative (Pet. App. A6-A7). Even though the government relied on petitioner's "promise" (Pet. Br. 6), that hardly converts the moratorium into government action constituting a taking.[33] Indeed, there is no way that the government could have enforced the moratorium so long as petitioner retained possession of and title to the land. If petitioner had at any time, either with or without advance notice to the government, decided to terminate the moratorium, the government's only recourse, if it wished to preserve the virgin timber, would have been to file a declaration of taking and take immediate possession of the property (see S. Rep. 93-875, *supra*, at 5-6). Cf. *Miller* v. *United States*, 531 F.2d 510, 513 (Ct. Cl. 1976).

In sum, as the court of appeals concluded (Pet. App. A11), this is a case in which "the government has not entered into actual possession or substantially interfered with the landowners' rights in their prop-

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[32] Because the moratorium was instituted in 1967—a full seven years before the legislation establishing the Big Thicket National Preserve was enacted—acceptance of petitioner's contentions in this regard would have the anomalous effect of establishing a date of taking long before there was any governmental action even contemplating the acquisition of the property.

[33] At the very most, it was a donation by petitioner to the government.

erty prior to payment [and accordingly] the date of taking is the date of payment." [34]

III. THERE IS NO UNFAIRNESS IN DENYING INTEREST IN A TYPICAL STRAIGHT CONDEMNATION SUIT

The district court's award of interest was based on its belief that the delays in the straight condemnation procedure are unfair to the landowner (Pet. App. B10-B11), and petitioner describes (Pet. Br. 40-44) a situation in which the landowner is the helpless victim of the arbitrary choice of the government to use straight condemnation rather than a declaration of taking. Neither perception is correct.

It is true that the period involved in the condemnation procedure may be extensive—between the time

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[34] Petitioner suggests (Pet. Br. 30-31) that the district court's assertion (Pet. App. B10) that the "condemnation proceedings instituted by the United States government have effectively denied [petitioner] economically viable use and enjoyment of its property since it is prevented from continuing its timber business" is a finding of fact, which should not have been reversed by the court of appeals because it was not clearly erroneous. For the reasons explained above, we believe that the statement was clearly erroneous. Moreover, there was certainly no evidence, and petitioner does not here argue, that its timber business was impeded, let alone prevented by the institution of the instant proceedings. Indeed, as the court of appeals notes (Pet. App. A4) petitioner conceded below "that it can find no support for the district court's position" that there was a taking when the condemnation proceeding was instituted. In any event, we note that this Court has not suggested, in its cases dealing with assertions that government actions have taken private property, that the district court's findings on the question are to be reviewed under the clearly erroneous standard. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293-297 (1981).

the government first announces its intention to take the land and the judgment in the condemnation suit, as well as between the date of judgment and payment of the award. Here, for example, the legislation establishing the Big Thicket National Preserve was enacted in October 1974, the valuation trial was held in 1979, and the commission award was entered in March 1980, affirmed by the district court in August 1981, and paid in March 1982. This passage of time, however, does not necessarily disadvantage the landowner. Where he is deriving a current benefit from the land—whether economic or otherwise—the fact that he retains possession until payment of the award usually makes the straight condemnation procedure preferable from his point of view.[35] Even where the land is unimproved and unleased, the landowner may be better off because of the delays. It often happens that land prices rise at a faster rate than would be accounted for by the payment of interest, so a delayed valuation date is more beneficial to the landowner.[36] Nor is an artificially early valuation date, well before the actual date of payment, neces-

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[35] Of course, determining whether the delay is beneficial to a particular landowner would require the court to determine his individual motivations for holding the land. A major advantage of the fair market value standard of valuation is that it avoids requiring a condemnation court to consider such particular values of the specific tract to its owner. See, *e.g.*, 1 L. Orgel, *Valuation Under the Law of Eminent Domain* §§ 14, 74-76 (2d ed. 1953).

[36] On that assumption, pre-trial delays and the use of the date of trial as the valuation date operate to his advantage. Cf. *Miller* v. *United States*, 531 F.2d 510, 513 (Ct. Cl. 1976) (legislative taking of land for Redwoods National Park designed in part "to stop land price escalation on the taking date").

sarily to his disadvantage. Thus, here, the fair market value of petitioner's timberland was calculated as of the date of the condemnation hearing in March 1979, when timber prices were at a 10-year peak, while the award was paid and the taking occurred in March of 1982, when they were substantially lower.[37]

If a landowner is in fact damaged by undue delays in a straight condemnation proceeding, he is not the helpless victim of arbitrary government action that petitioner portrays (Pet. Br. 42). Instead, he has several alternative remedies at his disposal. First, he may seek to enjoin any governmental activities that adversely affect his property. In such a suit, he could cite 42 U.S.C. 4651(8), expressing a federal policy against takings by inverse condemnation. See also *United States* v. *Central Eureka Mining Co.*, 357 U.S. at 166 n.12; *Union Oil Co.* v. *Morton*, 512 F.2d 743 (9th Cir. 1975).[38] Alternatively, if the landowner suffered damages in excess of mere collateral consequences of condemnation (see pp. 25-26, *supra*),[39] he could accept the diminution of his property rights, and sue to recover on an inverse condemnation theory. See, *e.g.*, *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. at 297 n.40. In that suit,

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[37] See a graph representing timber prices for the period 1974-1983 from Vardaman's Green Sheet (App., *infra*, 1a).

[38] The fact that it is hard to see what federal actions petitioner could have sought to enjoin here simply demonstrates that in this case there was no seizure of property before the passage of title.

[39] The difficulty of making this showing and the policy against inverse condemnation strongly suggest that the injunction route would be preferable.

recovery would be based on the value of the property interest taken over the period of the delay.[40] Indeed, an award of interest may be altogether inadequate as compensation to a landowner if the government has materially impaired the landowner's use and occupancy of the property before title has passed. A landowner in such circumstances may not be made whole through the payment of interest but can only be adequately and fairly compensated through an award based on damages arising from the government's conduct. See *United States* v. *General Motors Corp.*, 323 U.S. 373, 375 (1945).

Even if the landowner cannot establish that any governmental actions have interfered with the use of his property, he is not powerless in the face of a governmental decision to take by straight condemnation rather than by a declaration of taking. In almost all cases, he can force the government's hand, provoking either the filing of a declaration of taking in order to preserve the values for which the land is sought or abandonment of the decision to condemn. For example, here if petitioner had ended its voluntary moratorium on cutting timber in the area within the Preserve, the government would probably have promptly filed a declaration of taking. S. Rep. 93-875, *supra*, at 5-6. Similarly, in other situations in which the condemnation is sought in order to preserve wilderness areas, the government can be expected to react with a declaration of taking to actions by the landowners that seriously threaten the characteristics of the area. The government has no other way of pre-

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[40] Here, the land was inaccessible timberland during the period the condemnation was pending, on which the trees continued to grow, so the landowner did not lose any potential benefit from the land, and its inherent value did not decrease.

venting prejudicial actions by the landowner.[41] In sum, the landowner is not helpless in the face of the government decision to take his property by straight condemnation: he can in fact force the government either to file a declaration of taking or to abandon the condemnation effort.

Finally, we agree that the landowner should not be adversely affected by any delays between the entry of the judgment and the date it is paid and title passes.[42] Once the fair market value of the property has been established, the government should decide promptly whether it wishes to take it, and act on that decision.[43] But that does not mean that an award of interest is appropriate for any period of delay. Instead, if the landowner has been prejudiced because property values have increased in the interim, he should seek an adjustment in the award based on proof of the current value. Cf. *United States* v. *Clarke*, 445 U.S. at 258; *Gould* v. *United States*, 301

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[41] Contrary to the assumption of the district court (Pet. App. B10), absent such a declaration of taking there was simply no way that the government could "permit [or prohibit] the cutting of even one tree" on petitioner's property.

[42] As we have shown (p. 35, *supra*) the landowner here was not prejudiced by the delay, because the value of timberland dropped during the period between the trial and the taking.

[43] Although there was a three-year delay here between the trial and the payment of the award, the court of appeals correctly recognized (Pet. App. A11 n. 3) that that delay "was not attributable solely to the government." The commission's report was not submitted until a year after trial, and both parties filed objections to it, which were ultimately sustained by the court of appeals (Pet. App. A11-A12). The award was paid only seven months after the district court entered judgment on the amount recommended by the commission, which was the first point at which the amount of the award was established with reasonable certainty (Pet. App. A2).

F.2d 557 (D.C. Cir. 1962) (inappropriate to award interest between date of jury verdict and deposit of award in the absence of any showing that property has increased in value).[44] The court of appeals here, faced with "relatively contemporaneous" (Pet. App. A10) judgment and payment dates and no showing of a rise in the value of the property between those two dates, properly declined to award any addition to the just compensation paid.

Petitioner, perhaps recognizing this failure of proof on its part, claims (Pet. Br. 34) it lacked the opportunity to make such a showing. But there is as yet no final determination of value in this case. After the report of the commission, both petitioner and the United States filed objections, challenging not only the adequacy of the report under *United States* v. *Merz*, *supra*, but the amount of compensation determined to be due (see Pet. App. A11). The court of appeals remanded the case to the district court "for a determination of the various issues raised by the parties" (*id.* at A12). On remand, petitioner will thus have an opportunity to present evidence that the value of its property increased between the dates of valuation and taking (but see p. 35, *supra*). Only then would any additional moneys be due petitioner. They would be due not as interest, but as payment for a proven appreciation in the value of its property.[45]

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[44] Similarly, if property values drop substantially, or if the landowner takes action in the interim that decrease the value of the land—such as cutting timber—the government should be able to establish in a subsequent hearing that the fair market value has decreased at the time of taking.

[45] If there were no pending remand, a landowner who could establish that his property had significantly increased in value since the valuation date could file a motion pursuant to Fed. R. Civ. P. 60(b) seeking an increase in the just compensation awarded. A hearing on such a motion should be limited to

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 1984

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the question whether, since the award, the land values had increased. It would not be necessary to reconsider the elements that went into establishing the original valuation, and, accordingly, the supplemental hearing should not be complex or lengthy.

Alternatively, if there is an unreasonable delay between the entry of judgment and the taking of the property, the landowner could move for a dismissal of the condemnation proceeding under Fed. R. Civ. P. 71A(i)(3). If that motion were granted, he would be entitled to recover his costs, including attorney fees (42 U.S.C. 4654(a)).

Finally, the Department of the Interior has, on occasion since early 1982, entered into negotiated agreements with owners of condemned property when, because of budgetary constraints, the Department has been unable to pay condemnation awards promptly. Where the property values are likely to increase before the date of payment and the property owner is willing to forego a supplementary valuation hearing or a motion to dismiss, the Department has agreed to make payments of "interest" on the condemnation award from 60 days after the award until title is transferred on the day of taking.

APPENDIX

VARDAMAN'S GREEN SHEET 15 JANUARY 1983

TREE TOPICS

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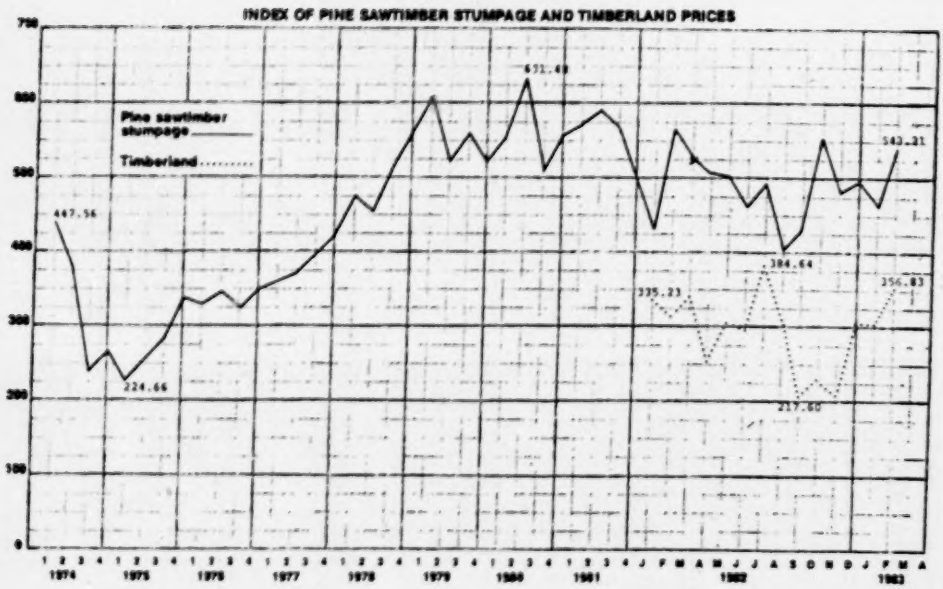

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